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In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

STEPHEN R. EAGAR, ET AL., PETITIONERS

v.

MAGMA COPPER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Stephen R. Eagar, Ray F. Stephens, James V. Mork, and Levi D. Jaramillo,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on May 31, 1967.

OPINIONS BELOW

Neither the initial opinion of the court of appeals (App., *infra*, pp. 13–17) nor its opinion denying rehearing (App., *infra*, pp. 18–20) is yet reported. The district court rendered no opinion.

[1] The Department of Justice represents these veterans pursuant to Section 9(d) of the Universal Military Training and Service Act, 50 U.S.C. App. 459(d).

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1966, and a timely petition for rehearing was denied on May 31, 1967 (App., *infra*, p. 18). On August 28, 1967, Mr. Justice Fortas extended the time within which to file a petition for a writ of certiorari to and including September 29, 1967. We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

QUESTION PRESENTED

An individual who was continuously employed by respondent, Magma Copper Company, for one year and worked 75 percent of the available shifts that year is entitled to a paid vacation if he is in respondent's employ at the end of that period. Respondent's employees are also entitled to certain paid holidays if they have been continuously employed by respondent for three months prior to the holiday. The question presented is whether, by virtue of Section 9 of the Universal Military Training and Service Act (50 U.S.C. App. 459), an individual who would be eligible for paid vacations and holidays but for the fact that his employment was interrupted by military service is entitled to them.

STATUTE INVOLVED

The pertinent provisions of Section 9 of the Universal Military Training and Service Act (62 Stat. 614, as amended, 50 U.S.C. App. 459) are as follows:

> (a) Any person inducted into the armed forces under this title * * * for training and service, who, in the judgment of those in author-

ity over him, satisfactorily completes his period of training and service * * * shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *.

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within 90 days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than 1 year—

* * * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor in interest, be restored by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case,

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so * * *.

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section should be so restored in such manner so as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

STATEMENT

Petitioners are four employees of respondent, Magma Copper Company. Under its collective bargaining agreement with petitioners' union, respondent's employees are entitled to paid vacations and holidays

on the following conditions:[1] Employees who have worked at least 75 percent of the shifts available for a year are entitled to a paid vacation at the year's end, provided that they are in respondent's employ on the day the vacation is to commence, and that "[a]ny employee leaving the service of the Company for any reason (except lay off due to reduction of work force) before his annual determinative date shall not be entitled to a vacation or vacation pay in lieu thereof." (App., *infra*, p. 14.) In order to receive a paid holiday, the agreement provides, a person must be continuously employed by respondent for three months prior to the holiday.

Petitioners' employment with the Magma Copper Company was interrupted by tours of military service. At issue is their right to vacation and holiday pay under the provisions described above unaffected by that interruption. Since the contentions of the four petitioners are identical, we confine discussion to petitioner Eagar, whom the court of appeals described as "fairly representative" of the other claimants (App., *infra*, p. 14).

Eagar entered respondent's employ on March 12, 1958. On March 6, 1959, just short of a year later, he left to enter the Armed Forces. Honorably discharged on April 17, 1962, he returned to his former position with respondent on May 2, 1962. Although Eagar was conceded to have worked more than 75 percent of the shifts available on his vacation-earn-

[1] The pertinent provisions of the relevant collective bargaining agreements are set out in the opinion of the court of appeals, App., *infra*, pp. 13–14.

ing year when he left for military duty on March 6, 1959, respondent refused him any paid vacation for that year because he was not in the company's employ on March 12, 1959, the anniversary date of his employment. In addition, respondent declined to pay Eagar for the Memorial Day and Independence Day holidays which followed his re-employment on May 2, on the ground that he had not been continuously employed for the requisite three month period prior to each of those holidays.

Petitioners contended that the Universal Military Training and Service Act entitled them to be treated as having been continuously employed for purposes of computing their rights to holiday and vacation pay. When respondent declined to honor their claims, they instituted this action in the district court. On the basis of the stipulated facts, that court awarded summary judgment to petitioners on October 5, 1964, and respondent appealed.

The court of appeals reversed. In an opinion rendered on January 31, 1966, it recognized as "well established" that Section 9(b)(B)(i) of the Universal Military Training and Service Act (50 U.S.C. App. 459(b)(B)(i)), which requires a returning veteran to be restored to a position of "like seniority, status, and pay" in his civilian employment, entitles the returning veteran, "without loss of seniority", to those benefits which automatically accrue from length of employment. However, the court concluded that vacation and holiday benefits were not perquisites of seniority but merely "fringe benefits," and, as such, governed by another clause of the Act—Section 9(c)(1)

(50 U.S.C. App. 459(c)(1)), relating to "insurance or other benefits". That section provides that a veteran restored to his former position:

> * * * [S]hall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces * * *.

Since time spent on furlough or leave of absence was not counted by respondent in determining an employee's right to vacation and holiday pay, the Ninth Circuit reasoned that military service time was also excluded.

Petitioners sought rehearing on the basis of this Court's grant of certiorari to review *Accardi* v. *Pennsylvania Railroad Company;* 341 F. 2d 72 (C.A. 2). In that case, dealing with re-employed veterans' rights to severance pay, the Second Circuit read the predecessor provision to Section 9 of the Act in the same manner as the court below in this case. On February 28, 1966, this Court unanimously reversed the decision of the Second Circuit, rejecting, *inter alia,* the distinction which that court had drawn on the basis of the "insurance or other benefits" clause of the Act between rights of seniority and fringe benefits. *Accardi* v. *Pennsylvania R. Co.,* 383 U.S. 225, 231–232.

On May 31, 1967, the Ninth Circuit denied the petition for rehearing by a divided vote. The majority ruled that this Court's decision in *Accardi* had no bearing on the instant case because in that case the "Court did not have before it a 'fringe benefit' type of claim such as those involved in this case * * *"

(App., *infra*, p. 18). Judge Madden dissented on the ground that the majority decision was contrary to *Accardi*, noting that the paid vacations and holidays claimed by petitioners in this case "would have automatically accrued to them had they remained in private employment" instead of entering military service and that this had been the test employed by the Court in *Accardi* to determine whether veterans are entitled to benefits under Section 9 of the Act (App., *infra*, pp. 19–20).

REASONS FOR GRANTING THE WRIT

The ruling of the court of appeals in this case is directly contrary to this Court's decision last Term in *Accardi* v. *Pennsylvania R. Co.*, 383 U.S. 225, and is in conflict with the decisions of another circuit. If left undisturbed, it will deprive veterans restored to their former civilian jobs of substantial benefits that Congress intended Section 9 of the Universal Military Training and Service Act to guarantee them. Review by this Court is plainly warranted.

1. *Accardi* involved the right of re-employed veterans, under what is now Section 9 of the Act,[2] to be treated as though continuously employed in their civilian jobs during their time in military service for purposes of determining the amount of certain separation allowances. In precisely the same manner as in the

[2] Petitioners in *Accardi* were veterans of World War II. As such, their rights in civilian employment were governed by Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, as amended, 50 U.S.C. App. (1946 ed.) 308. As the Court noted (383 U.S. at 226, n. 1), Section 8 of the 1940 Act was re-enacted as Section 9 of the Universal Military Training and Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. 459, the provision applicable here.

case at bar, the Second Circuit in *Accardi* had read the statute as distinguishing between rights flowing from "seniority" and mere "fringe benefits." 341 F. 2d 72, 74. With regard to "seniority" rights, the Second Circuit held that veterans were entitled to be treated as if they had never interrupted their civilian employment. But "fringe benefits," that court held, were governed by the clause of the Act dealing with "insurance or other benefits" (now Section 9(c)(i)), which, in the court's view, placed the returning veteran in no better position than an employee furloughed or on leave of absence for non-military reasons.

This Court reversed the Second Circuit's decision in *Accardi*, holding that Congress intended the Act "to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country," without regard to the "label" which might be placed upon a particular employment benefit. 338 U.S. at 229–230. The Court expressly rejected the interpretation given the "insurance or other benefits" clause by the Second Circuit, holding that this provision had not been intended to qualify the rights guaranteed a returning veteran by other provisions of the Act. It "was intended to add certain protections to the veteran and not take away those which are granted him by [9(b)(B)]" (383 U.S. at 232).

The Ninth Circuit's decision in the instant case cannot be reconciled with *Accardi*. In this case, as in

that one, it was not disputed that the benefits claimed by the re-employed veterans would have accrued to them automatically had they remained in civilian employment instead of entering the Armed Forces. This Court has made clear that all such benefits, whether or not denominated "fringe benefits", accrue to the returning veteran without loss of seniority.

The decision below is also in direct conflict with decisions of the Third Circuit. On two occasions that circuit has squarely held the Act in suit to "embrace vacation rights which the employee has earned and would have received as a matter of course but for his induction." *Mentzel* v. *Diamond*, 167 F. 2d 299, 301; *MacLaughlin* v. *Union Switch & Signal Company*, 166 F. 2d 46, 48.[4]

2. The decision below, if allowed to stand, will cause a widespread problem in the application of the re-employment provisions of the Universal Military Training and Service Act, embracing as they do a vast number of employees—those who have served, and who are continuing to be called for service, in the Armed Forces.[5] Moreover, "fringe benefits" in collec-

[4] Vacations may also form a part of an employee's compensation in that they may have to be earned by a given period of actual work. In that sense, they are not based on "seniority", *i.e.*, length of service alone. However, in this case it is not disputed that petitioners worked the requisite percentage of shifts to be entitled to vacation pay. That pay was denied them because they left respondent's employ, not because it was unearned.

[5] Even limited to vacations, this case has a significant impact. We are informed by the Department of Labor, which administers the provisions in suit, that more than seventy vacation and holiday pay claims have been filed in that Department since the Ninth Circuit's decision in this case. In addition, the Department advises that at least three fourths of the col-

tive bargaining agreements are not limited, as the court of appeals suggested (App., *infra*, p. 16), to "a fairly narrow group of economic advantages." In an era when wages are generally high and income taxes steep, labor and management recognize that it is in the interest of employees to take a large part of their compensation in indirect forms. Unions bargain vigorously for a host of diverse benefits besides wages and the "traditional" rights of seniority.[6] To describe these extensive and valuable additional benefits as "fringe" items is a mere play on words; they are in-

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lective bargaining agreements involving major employers throughout the country contain vacation provisions contingent upon length of service with the employer. Consequently, the instant decision will necessarily affect the vacation rights of most returning veterans.

[6] Such as pensions and retirement plans (*Retail Clerks Union, No. 1550*, v. *N.L.R.B.*, 330 F. 2d 210 (C.A.D.C.), certiorari denied, 379 U.S. 828; *Inland Steel Co.* v. *N.L.R.B.*, 170 F. 2d 247 (C.A. 7), certiorari denied, 336 U.S. 960); profit sharing (*National Labor Relations Board* v. *Black-Clawson Co.*, 210 F. 2d 523 (C.A. 6); bonuses (*National Labor Relations Board* v. *Citizens Hotel Company*, 326 F. 2d 501 (C.A. 5); merit pay (*National Labor Relations Board* v. *United Brass Works, Inc.*, 287 F. 2d 689 (C.A. 4)); company-furnished housing (*National Labor Relations Board* v. *Bemis Bro. Bag Co.*, 206 F. 2d 33 (C.A. 5)); stock purchase plans, (*Richfield Oil Corporation* v. *National Labor Relations Board*, 231 F. 2d 717 (C.A.D.C.), certiorari denied, 351 U.S. 909); vacations (*National Labor Relations Board* v. *Century Cement Mfg. Co.*, 208 F. 2d 84 (C.A. 2)); group health insurance (*W. W. Cross & Co.* v. *N.L.R.B.*, 174 F. 2d 875 (C.A. 1)); and even discounts on gas used for house heating purposes (*National Labor Relations Board* v. *Central Illinois Public Service Co.*, 324 F. 2d 916 (C.A. 7)). See, also, Forkosch, *A Treatise on Labor Law* (2d ed., 1965), § 557, pp. 854–866; Ross, *Fringe Benefits Today and Tomorrow*, 7 Labor L.J. 476 (August 1956); Note, *Proper Subjects for Collective Bargaining: Ad Hoc* v. *Predictive Definition*, 58 Yale L.J. 803 (1959).

ceasingly regarded as critical elements of employee remuneration. The exclusion of veterans from benefits which have come to be regarded as essential perquisites of employment is plainly inconsistent with the statutory scheme.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed on the authority of *Accardi* v. *Pennsylvania R. Co.*, 383 U.S. 225.

Respectfully submitted.

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SEPTEMBER 1967.

APPENDIX

United States Court of Appeals for the Ninth Circuit

No. 19777

MAGMA COPPER COMPANY, SAN MANUEL DIVISION, A CORPORATION, APPELLANT

v.

STEPHEN R. EAGAR, RAY F. STEPHENS, JAMES V. MORK, AND LEVI D. JARAMILLO, APPELLEES

(January 31, 1966)

Appeal from the United States District Court for the District of Arizona

Before: CHAMBERS, *Chief Circuit Judge;* MADDEN, *Judge of the Court of Claims,* and KOELSCH, *Circuit Judge.*

KOELSCH, *Circuit Judge:* Invoking Section 9 of the Universal Military Training and Service Act of 1948, 50 U.S.C. War Appendix, Section 459, plaintiffs brought this suit against the Magma Copper Company to recover holiday and vacation pay which they assert is due them.

Magma's employees were entitled to such pay under a series of contracts entered into between Magma and International Union of Mine, Mill & Smelter Workers, which represented the employees. The following provisions are pertinent to this case:

> "*9–8 Vacations.* B. Requirements to qualify. An employee who has been continuously employed by the Company for at least one (1) year immediately preceding the date of his

application for vacation and who has not had a vacation within said year and who has worked at least 75% of his available shifts within said year and who is an employee of the company on the day his vacation commences shall be entitled to a vacation with pay as hereinafter set forth.

* * * * *

E. * * * (7) Any employee leaving the service of the Company for any reason (except lay off due to reduction of work force) before his annual determinative date shall not be entitled to a vacation or vacation pay in lieu thereof * * *"

"*12-2 Holiday Pay.* A. Employees covered by this Agreement shall be paid the straight time rate, exclusive of shift differential, for the named holidays when not worked, subject to the following terms and conditions:

* * * * *

ii. An employee must have been on the Company's payroll continuously for three (3) months prior to the holiday in question."[1]

Plaintiffs were all employees of Magma immediately before entering into the armed services of the United States. Following their satisfactory completion of service they were restored to proper positions by Magma. The several claims they asserted were virtually the same; the facts were all stipulated and the issues purely legal ones. Those relating to the claim of Stephen R. Eagar are fairly representative. Eagar was continuously employed by Magma from March 12, 1958 until March 6, 1959, when he entered into military service. By the latter date he had already worked in excess of 75% of the shifts available in his vacation earning year (i.e., March 12, 1958 to March 12, 1959).

[1]The quoted provisions taken from the 1962 Labor Agreement are common to the various labor agreements in effect throughout the periods under consideration.

Following his return on May 2, 1962 he worked the last scheduled shift prior to and the first scheduled shift after the Memorial Day and Independence Day holidays. Magma refused his demand for vacation pay for the year commencing March 12, 1958 and for holiday pay for the two mentioned holidays. The grounds for refusal were that (a) as to vacation pay, he was not in the service of the Company at the end of his vacation earning year as required by the contract and (b) as to holiday pay, that he had not been on the Company payroll for the required period prior to either holiday.

The district court, however, rejected Magma's contentions and entered judgment for the plaintiffs. Magma has appealed.

The proposition is well established that present Section 9(b) B(i) of the Act [50 U.S.C. App. 459(b) B(i)] which requires the employer to restore a returning veteran to a position of like "seniority status and pay," means that "[h]e (the veteran) shall be 'restored without loss of seniority' and be considered 'as having been on furlough or leave of absence' during the period of his service for his country, with all of the insurance and other benefits accuring to employees on furlough or leave of absence. Section 8(c). Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold* v. *Sullivan Drydock & Repair*, 328 U.S. 275, 284-285 (1946).

In every instance where the issue has been presented, the courts have consistently held that the statute treats of two types of benefits: (a) "seniority, status and pay" and (b) "insurance and other benefits"; that "seniority" includes rights which auto-

matically accrue as a direct incident of length of job tenure—"a perquisite of seniority" [*Siaskiewicz* v. *General Electric Co.*, 166 F.2d 463, 466 (2d Cir. 1948)]; that "other benefits" cover "a fairly narrow group of economic advantages whose common quality [is] that they [are] miscellaneous 'fringe benefits' not usually regarded as part of 'pay,' 'status,' or 'seniority'" [*Borges* v. *Art Steel Co.*, 246 F.2d 735 (2d Cir. 1957)]; and that although "seniority" rights cannot lawfully be denied or diminished, the enjoyment of "other benefits" is governed by established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person (i.e., the veteran) was inducted. *Siaskiewicz* v. *General Electric Co., supra; Borges* v. *Art Steel Co., supra; Dougherty* v. *General Motors*, 176 F.2d 561 (3d Cir. 1949). See also *Dwyer* v. *Crosby Co.*, 167 F. 2d 567 (2d Cir. 1948). They have said, to quote from *Borges*, that "Vacation pay is of this fringe character, and we have previously refused to let returning veterans collect it if non-veterans on leave of absence do not get it." Speaking of the *Siaskiewicz*, *Borges* and *Dougherty* cases, appellees label them "plainly inapplicable" and incorrectly decided. They argue that "were it not for the interruption for military service, each of the appellees would, by the mere passage of time have received the vacation and holiday benefits claimed." This, of course, is a completely erroneous assumption which ignores the language of the statutes and flies directly in the face of the express eligibility provisions of the labor agreements.[2]

[2] In 1948 Congress amended Section 9(c) by the addition of "Section 3" which reads:

> It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) (of this section) should be so restored in such manner as to

In sum, we are in accord with the following quotation from the *Siaskiewicz* case:

> Since vacation rights are not pay unless they are for work actually done, and since they are not merely a perquisite of seniority, they must fall under the heading of "other benefits." Hence under this language of the Act, appell[ees] must be treated like non-veteran employees on furlough or leave of absence. But non-veteran employees of [Magma] who were on leave of absence * * * would not be entitled to vacation pay for that year. Therefore, appell[ees] are not so entitled. To grant them such pay would be to discriminate in favor of them as veterans, and against non-veteran employees.

This same rationale dictates the same conclusion with respect to the claims for holiday pay.

The judgment of the district court is reversed and the action is dismissed. No costs are allowed.

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give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

It would appear that the amendment did no more than reflect Congressional approval of the Supreme Court's prior decisions construing the statutory language relating to the returned veteran's rights to seniority, status, and pay. *Tilson* v. *Missouri R.R. Co.*, 376 U.S. 169 (1964). None of those decisions dealt with fringe benefits.

United States Court of Appeals for the Ninth Circuit

No. 19777

MAGMA COPPER COMPANY, SAN MANUEL DIVISION, A CORPORATION, APPELLANT

v.

STEPHEN R. EAGAR, RAY F. STEPHENS, JAMES V. MORK, AND LEVI D. JARAMILLO, APPELLEES

(May 31, 1967)

Order on Petition for Rehearing

Before: CHAMBERS, *Circuit Judge,* MADDEN, *Judge of Court of Claims, and* KOELSCH, *Circuit Judge.*

PER CURIAM.

In a petition for rehearing, appellees contend that our decision is contrary to the law as announced in *Accardi* v. *Pennsylvania R.R. Co.,* 383 U.S. 225 (1966). We perceive no conflict.

What the Court said in Accardi regarding the policy of the Act was in the context of claims under Sec. 9(b)(B); the so-called "seniority" provision. It is of course well settled that a veteran's seniority is not impaired by reason of his military service, but to the contrary "automatically accrues" despite such service. Accordingly, he is "treated as though he had been continuously employed during the period spent in the armed forces." *Accardi,* p. 228. The Court did not have before it a "fringe benefit" type of claim such as those involved in this case and neither said nor intimated that such claims should be classified as Sec. 9(b) type claims or treated like them.

The petition for rehearing is denied.

MADDEN, Judge, dissenting:

I would grant the appellees' petition for rehearing. This Court's decision was announced on January 31, 1966. On February 28, 1966, the Supreme Court of the United States decided the case of *Accardi et al.* v. *Pennsylvania Railroad Co.*, 383 U.S. 225. In that case the Court of Appeals had decided that the severance pay there involved did not concern "seniority, status, and pay" within the meaning of §§ 8(b)(B) and (c) of the Selective Training and Service Act of 1940; that it was a "fringe benefit" and subject to whatever contractual provisions the employer had made with the union which was the bargaining agent for the employees. The Supreme Court said, in *Accardi*, pp. 229–230:

> As we said in *Fishgold* v. *Sullivan Corp.*, *supra*, "[N]o practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." At 825. The term seniority is not to be limited by a narrow technical definition but must be given a meaning that is consonant with the intention of Congress as expressed in the 1940 Act. That intention was to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country. In this case there can be no doubt that the amounts of the severance payments were based primarily on the employees' length of service with the railroad.

In our instant case, two of the employees had worked for almost a year, one lacking only seven days of the year necessary, under the union contract, to earn a paid vacation. Their work was interrupted, thus short of the necessary year, by their entrance into military service. The Supreme Court's language in

Accardi, quoted above, fits their situations exactly. The rights and benefits (paid vacations) which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country are the rights and benefits here at issue.

Three of the employees here involved worked both before and after several holidays. But their work after the holidays was not sufficiently soon after the holidays to entitle them, under the contract, to pay for the holidays. The reason why they were not at work immediately after the holidays was that they were then in the military service. The Supreme Court's language in *Accardi* applies to their situation.

I gather from the Supreme Court's opinion in *Accardi* that the distinction which the Court of Appeals made in *Accardi*, and which this court makes in the instant case, between "seniority, status and pay" on the one hand and "fringe benefits" on the other does not seem very vital to the Supreme Court. The issue seems rather to be whether the rights and benefits claimed by the employees "would have automatically accrued to them had they remained in their civilian jobs" instead of entering the military service.

I think our decision is contrary to *Accardi* and that we should grant the petition for rehearing.

U.S. GOVERNMENT PRINTING OFFICE: 1967